SUPREME COURT, U.S.
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No. 91-469

In The

Supreme Court of the United States

October Term, 1991

PARAGOULD CABLEVISION, INC.,

Petitioner,

v.

CITY OF PARAGOULD AND THE PARAGOULD LIGHT AND WATER COMMISSION, *ET AL.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION BY RESPONDENT PARAGOULD LIGHT AND WATER COMMISSION

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BRIEF IN OPPOSITION BY RESPONDENT PARAGOULD LIGHT AND WATER COMMISSION

The Paragould Light and Water Commission hereby files its brief in opposition to the petition for writ of certiorari filed by Paragould Cablevision, Inc. on September 16, 1991 seeking review of the judgment of the Eighth Circuit Court of Appeals in this case.

COUNTER STATEMENT OF THE CASE

Events Leading Up To The Introduction of Competition

Paragould Cablevision, Inc. ("Cablevision"), a subsidiary of Cablevision Systems Corporation,[1] has been operating a cable television system in the City of Paragould for a number of years. Cablevision currently provides cable television service to community residents pursuant to a non-exclusive franchise granted by the City of Paragould in 1983. Paragould Light and Water Commission ("CLW") is a municipally owned entity created by the City of Paragould ("City") in accordance with an act of the Arkansas legislature to provide electrical, water and sewer services in the community.

In 1984, at the instigation of the cable television industry, Congress passed the Cable Communications Policy Act ("Cable Act"), 47 U.S.C. § 521 *et seq.*, which, among other things, had the practical effect of eliminating rate regulation of cable service in all but a few communities (pursuant to 47 U.S.C. § 543) and allowing the Federal Communications Commission to preempt the enforcement of meaningful technical standards by local franchise authorities (pursuant to 47 U.S.C. § 544(e)). The result in Paragould, as in most communities, was an unregulated de facto monopoly. In the wake of deregulation prices greatly increased and service deteriorated.

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[1] According to Broadcasting Yearbook, 1989 Ed., which is generally considered to be an authoritative industry source, Cablevision Systems Corporation is the 9th largest operator of multiple cable systems, operating 28 cable systems serving in excess of 1,000,000 subscribers nationwide.

In the face of increasing public dissatisfaction with the cable service provided by Cablevision and powerless to enforce substantial reform under the limits to its regulatory powers imposed by the Cable Act, the City Council decided to introduce competition in the provision of cable service. Following public hearings on the matter, in 1986 the City Council placed before the voters for approval an ordinance which would authorize the construction of a municipally owned cable television to be operated by CLW, consistent with enabling Arkansas statutes. On June 17, 1986 the voters approved the ordinance by an affirmative vote in excess of three to one. The City approved a franchise agreement effective January 16, 1989, consistent with the requirements of the Cable Act, pursuant to which CLW would provide the cable service. That franchise agreement, nearly identical to Cablevision's 1983 franchise agreement, was designed to establish a "level playing field" under which CLW would compete fairly with Cablevision.

By a special election held on October 31, 1989 the voters approved the issuance of municipal bonds to finance the construction of the cable system. On January 22, 1990 the City Council passed an ordinance authorizing the issuance of the bonds.

Cablevision Initiates Litigation

On January 29, 1990, even before CLW had strung the first foot of cable, Cablevision initiated the instant lawsuit.[2] In its complaint Cablevision alleged in Count I that

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[2] On January 18, 1990, Cablevision also filed a suit in state court alleging that the construction and operation of the cable

(Continued on following page)

the defendants announced plans to enter the cable television market constituted a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, under a monopoly leveraging theory. In Count II Cablevision alleged that a provision of its franchise agreement which restricts its carriage of local advertising constitutes a violation of the First and 14th Amendments. In Count III it was alleged that by granting a franchise to CLW the City breached its contract obligations with Cablevision under a theory of good faith and fair dealing.

Acting on the motions of the City and CLW, the U.S. District Court dismissed all three counts of the lawsuit.[3] Count I was dismissed as to the individual defendants on the ground of legislative immunity and as to the City and CLW on the basis of state action immunity.[4] Count II was

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(Continued from previous page)

system by CLW was illegal under Arkansas law. The complaint sought a permanent injunction against the construction and operation of a cable system by either the City or CLW. Following summary judgement by the Greene County Chancery Court in favor of the City and CLW, Cablevision sought review before the Arkansas Supreme Court. On May 17, 1991 that court affirmed the decision of the Chancery Court, finding that the City had lawfully delegated authority to CLW to construct and operate the cable system. *Paragould Cablevision, Inc. v. City of Paragould et al.*, 305 Ark. App. 476 (1991).

[3] The text of Judge Thomas Eisele's order dismissing the lawsuit is reprinted in the appendix of Cablevision's petition at pages 10a-27a.

[4] The District Court did not reach the alternative arguments submitted by the defendants to the effect that the antitrust laws are not available to sustain a monopoly and that the action was premature in that the plaintiff had not suffered actionable injury.

dismissed on the ground that the contractual provision complained of does not violate the protection of either the First or 14th Amendments. Count III was dismissed because it involved a pendant contract claim under state law.

On appeal, the Eighth Circuit affirmed the District Court dismissal of Cablevision's complaint. It found that the Arkansas statutes provide state action immunity from any anticompetitive implications in the City's and CLW's conduct in entering into the cable television business. Relative to the constitutional claim, the Eighth Circuit held that by entering into a franchise agreement which excluded its carriage of local advertising, Cablevision had bargained away any free speech rights it may have had with respect to such advertising.[5]

Cablevision's Mischaracterization Of The Decisions Below And The Introduction Of Facts Not At Issue

In its petition before this Court Cablevision attempts to interpret the Eighth Circuit opinion in broader terms with more sweeping impact than warranted in context with either the law expressed in the opinion or the facts at issue. It characterizes the case as involving "the question of whether the municipally-owned cable system may engage, as it is currently doing, in whatever anticompetitive, predatory and coercive activities it desires, without the constraint of the antitrust laws, until it has succeeded in running its competitor out of business." (Petition at

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[5] See text of decision reprinted in the appendix to the Petition at 1a-9a.

3-4.) In no way could the opinions of either the District Court or the Eighth Circuit be read to support such hyperbole.

Further, in its Statement Cablevision shows no regard for the facts alleged in its complaint, which was filed before CLW commenced construction of its cable system and pertained to allegations such as the City's power to regulate, CLW's control over the poles as used by Cablevision, CLW's monopoly in the sale of electric power, and the "belief" that CLW would string its cable in violation of the National Electric Safety Code. Cablevision's petition before this Court says little about these alleged facts. Rather, it has now introduced new "facts" to support the "egregious" conduct it claims to be facing, such as "the City has flexed its taxing authority muscle in its efforts to persuade voters to support a municipally-owned system," CLW is leveraging "itself into a monopoly position through cross-subsidization, predatory pricing, and other anticompetitive acts," and "the City is rapidly advancing towards its goal of market dominance and monopolization."[6]

There are no such factual allegations in Cablevision's complaint (see text reprinted in the attached appendix). It is elementary that any court addressing a motion to dismiss must accede the truth of factual allegations for purposes of the motion. And that is what both the District

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[6] Petition at 4-5. It is interesting to note that Cablevision bases this claim of "market dominance" on the fact that after six months (when the CLW system was essentially fully constructed) CLW had 2,000 subscribers to Cablevision's 5,000.

Court and the Eighth Circuit did in addressing the issues here.

Cablevision's Objective Is The Elimination Of Competition

Notwithstanding Cablevision's pious statement made repetitively in its Petition that it does not oppose CLW's entry into the cable business, there is no doubt that its objective in initiating litigation is the elimination of competition. Its complaints in both federal and state court specifically and clearly seek a permanent injunction against the operation of the municipal cable system and were filed before the first foot of cable were strung. With incredible chutzpa and brazenness Cablevision attempts to turn the Sherman Act on its head and use it as a shield to protect its previous monopoly position. Similarly, it attempts to use the First Amendment as a club to drown the "voice" of CLW, the second cable system "speaker" in the community.

There is little doubt that Cablevision and its allies in the cable television industry are determined to challenge almost every municipality that has had the temerity to launch a publicly owned cable system in competition with a privately owned former monopolist.[7] No doubt that is the motivation of the powers of the industry, the

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[7] Incumbent cable operators have initiated legal challenges to the entry of municipally owned competitors in following cities, in addition to Paragould: Niceville, Florida; Glasgow, Kentucky; Osage City, Kansas; Negaunee, Michigan; Elbow Lake, Minnesota; and Philippi, West Virginia.

National Cable Television Association, Tele-Communications, Inc., United Artists Entertainment Co., Storer Cable Communications, Inc., and Comcast Cable Communications that seek approval to file amicus briefs in support of the Cablevision position. There is no reason for this Court to give further legal opportunities to these forces in their cynical attempts to smother in its infancy this real, if embryonic, threat of competition.

SUMMARY OF REASONS FOR DENIAL OF THE PETITION

First and foremost, this Court must recognize that the issues posited by this case according to Cablevision are far beyond what is needed to address the controversy raised by Cablevision's complaint. As will be demonstrated in the argument presented below in connection with each of these so called "issues", either the questions were not raised below or their resolution is not necessary in resolving the issues raised by the complaint. In other words, the Petitioner is attempting to raise issues, which in the abstract may be interesting, that need not be addressed in connection with this case. In misportraying the issues that are necessary to the resolution of this case, Cablevision is violating the charge of accuracy, clearness and relevance demanded by Rule 14.5 of this Court.

In general, Cablevision has attempted to massage the facts and characterize the decisions below so as to imply that they raise issues of major importance with sweeping

precedential implications. Careful analysis brings to light this attempted transmogrification.

According to Cablevision the result of these "errors" will be "to permit any municipality to run out a private cable speaker by whatever anticompetitive means it chooses" and "any municipality can extract a 'waiver' of First Amendment rights in the franchising process, a task made easier by the threat of predatory municipal competition." (Petition at 9.) The end result, according to Cablevision, "will be communities with no local speaker, but only a government-owned electronic press . . . a particularly chilling result in the thousands of communities like Paragould with no truly local over-the-air broadcast station." (*Id.*)

Reading such hyperbole detailing the dire consequences of the decision below one could almost envision a radical diminution of the antitrust laws and the First Amendment with local governments left and right ruthlessly driving out of business media companies valiantly flying the flag of the First Amendment to the end. If a "Chicken Little" prize were awarded for the "sky-is-falling" rhetoric in pleadings, Cablevision would surely be a winner.

In reality what this case stands for – nothing more or less – is the attempt of a major cable television conglomerate to use the antitrust laws and the First Amendment in a blatant attempt to exclude competition by a small publicly owned competitor. The lawsuit was dismissed below because it simply states no judiciable claims under law. No sweeping new precedents were set by the Eighth Circuit opinion. From a practical standpoint, the only end

result of a refusal by this Court to review the decision below will be that a few more communities may be emboldened to introduce a competitive alternative to the *de facto* cable television monopoly.

In summary, Cablevision has violated the rules of the Court in setting forth the questions for review. It has inaccurately set forth the facts at issue and mischaracterized the opinion below. Further, analysis of the issues raised by Cablevision and addressed below reveals no error of law and demonstrates no major national interest that would warrant this Court's review. Accordingly, the petition should be denied.

ARGUMENT

I. The Questions Presented By Cablevision Far Exceed The Legitimate Issues Posed By The Complaint And The Decision Below And Thus Violates The Court's Procedural Rules

Cablevision advances three arguments in support of its petition. First, it claims that a municipally owned commercial participant should be fully subject to the antitrust laws regardless of the state action immunity doctrine. Second, it argues that the Arkansas legislature did not authorize behavior in violation of the Sherman Act. And finally it contends that the Eighth Circuit failed to apply relevant precedent in analyzing its First Amendment claims.

Rule 14.5 of this Court states that "[t]he failure of a petitioner to present with accuracy, brevity, and clearness

whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." Cablevision has undoubtedly violated this rule in more than one fundamental manner.

First, Cablevision's petition repeatedly states that it does not oppose the entry of CLW into the cable business when in fact (1) its complaint was filed before CLW even commenced construction of its cable system and thus necessarily involved *only* the question of entry and the allegations in the complaint relating to entry, and (2) its complaint seeks a *permanent injunction* against the construction and operation of CLW's cable system. (See the appendix hereto at 13a.) This obviously violates the requirement of "accuracy" relevant to the legitimate issues of the case.

Second, in its obvious attempt to attract the interest of the Court, Cablevision has mischaracterized the issues. Most significantly, it has posited as a question: "Whether the conduct of a municipally-owned cable television system, as a market participant, is entirely immune from antitrust scrutiny." Cablevision attempts to support this broad question, as pointed out above, by the introduction of new alleged facts that go far beyond the allegations of the complaint and seriously misrepresents the immunity question as related to the facts alleged in the complaint. Consequently, Cablevision has violated the charge to petitioners under Rule 14.5 to *accurately* and *clearly* present the *essential* points requiring consideration by the Court.

The details relative to these points are discussed in more depth in connection with the argument below addressing the various Cablevision claims.

II. The Eighth Circuit Properly Decided The Antitrust Immunity Issue Consistent With The Facts Before It.

a. The Legal Standard For Immunity

There appears to little substantive dispute as to the general standard for a finding of state action immunity under the doctrine established in *Parker v. Brown*, 317 U.S. 341 (1943). Under this doctrine a state's action is immune from claims under the federal antitrust laws. Without attempting to detail the development of the doctrine over the years and how it applies to various activities that may have the color of state action, it suffices for purposes here simply to outline the precedent relevant to municipal immunity. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123 (1978), the Supreme Court held that municipalities do not on their own have the immunity accorded a state but have immunity only when they are operating pursuant to a clearly articulated policy contemplated by the legislature. In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court developed a second test, i.e., active state supervision of the activity complained. In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Court held that this active supervision test does not apply to municipal entities. More relevant here, it expanded on the *City of Lafayette* test for the clearly articulated state policy, holding that "the municipality need not 'be able to point to a

specific detailed legislative authorization' in order to assert a successful *Parker* defense," quoting in part from *Lafayette*, and going on to conclude that it is enough if the alleged anticompetitive conduct "is a foreseeable result" of the statutory scheme. *Id.* at 39, 42.

Cablevision makes two claims of error relative to the state action immunity issue. First, it contends that a municipally owned commercial participant "should be" subject to the antitrust laws. Its second argument is that the courts below did not properly interpret the legislative intent of the Arkansas legislature relative to antitrust immunity.

b. Immunity For The Municipal Competitor

Cablevision argues that "a municipally-owned market participant should be subject to the same rules of competitive behavior as all of its competitors." (Petition at 10.) In support of this proposition it argues that the Eighth Circuit misapplied *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344 (1991). It should be noted that *City of Columbia* is such a recent case that it was handed down after this case was briefed and argued before the Eighth Circuit. The Petitioner subsequently supplied a copy of the case to that court shortly before its decision was issued.

The Eighth Circuit did take notice of *City of Columbia* in its decision, stating that it "suggested in dicta that there may be a market participation exception to state immunity."[8] However, it went on to characterize the "market exception" as merely a suggestion and not a rule of law.

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[8] Text reprinted in Petitioner's brief at 3a.

Based on *City of Columbia* Cablevision now argues that municipally owned competitors should be exempt from the state action immunity doctrine which has built up over the years. There are several reasons why the Court should reject such a suggestion.

First of all, as the Eighth Circuit noted, that comment was clearly offered in dicta in *City of Columbia*. Such a sweeping policy change should be made only after careful consideration by this Court, if not by Congress, on the basis of a full record in a case where the issues require its resolution.

Second, and more importantly, it is not necessary to address that question in order to rule on the legitimate issues in this case. As pointed out above, Cablevision's complaint was filed well before CLW commenced its cable service. Hence, the essential issue here is, and has been, whether any anticompetitive results of CLW's entry into the cable business, which is what Cablevision's complaint focused on, was contemplated by the Arkansas legislature. The broader question posed by Cablevision is whether there should be any limits to the immunity of a municipal competitor. Apart from the rhetoric of Cablevision which alleges facts that are not part of its complaint or the record below, that question is simply not at issue here. As discussed below, the only immunity issue goes simply to market entry by CLW and those acts, as alleged by Cablevision in its complaint, which are associated with entry.

c. The Intent Of The Arkansas Legislature

The basis for the City's and CLW's immunity are three Arkansas statute provisions: A.C.A. Sec.

14-199-601(a) (which allows a city to acquire, construct and operate a cable system[9]), A.C.A. Sec. 14-199-602 (which pertains to a city's erection and maintenance of wires and other cable system fixtures[10]), and A.C.A. Sec. 14-164-303, 309 (which provides for the issuance of municipal bonds for municipal improvements, including "facilities for the generation, transmission, and distribution of television communications"). The District Court characterized this grant of powers as "broad," "sweeping" and "comprehensive," finding that "these statutes authorize the entry of the city into the market and reflect the state's policy to permit the city to 'displace competition' since 'the challenged restraint is a necessary and reasonable consequence of engaging in the authorized activity.' "[11]

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[9] This statute states: "Any first-class city, second-class city, and incorporated town may own, construct, acquire, purchase, maintain, and operate a television signal distribution system for the purpose of receiving, transmitting, and distributing television impulses and television energy, including audio signals and transient visual images, to the inhabitants of the city or town and to the inhabitants of an area not to exceed two (2) miles outside the boundaries of the city or town."

[10] This section states: "The city or town may erect, construct, operate, repair, and maintain in, upon, along, over, across, through, and under its streets, alleys, highways, and public grounds, poles, cross-arms, cables, wires, guy wires, stubs, anchors, towers, antennas, pipes, connections, and other appliances, fixtures, and equipment necessary, expedient, or useful in connection with a television signal distribution system."

[11] District Court Order reprinted at 5a of Petitioner's brief, quoting from *L & H Sanitation v. Lake City Sanitation*, 769 F.2d 517, 522 (8th Cir. 1985).

The Eighth Circuit concurred in this analysis. It concluded that Arkansas had clearly authorized municipalities to enter the cable business and that given the fact that municipalities generally enjoy access to government infrastructure such as utility poles and rights-of-way, an entity such as CLW benefits from this access and other advantages. It concluded that "[b]ecause of the nature and extent of municipal operations, the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies."[12]

In challenging this finding, Cablevision argues that the "intent of the City and CLW to destroy competition in the cable television . . . is not a necessary and reasonable consequence of the defendants engaging in the cable television business, the 'authorized activity' by the State of Arkansas." (Petition at 14.) It further argues that the Arkansas legislature did not intend the silencing of "First Amendment speakers" through anticompetitive means.

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[12] Text reprinted in Petitioner's brief at 6a. Note that these factors are more likely to be characterized as inherent advantages rather than consisting of anticompetitive conduct. Similarly, Cablevision has certain inherent competitive advantages that CLW does not enjoy due to Cablevision's position as a subsidiary of a major multiple system operator (see note 1). This status yields many advantages for Cablevision, e.g., easy access to capital, highly experienced management, and great bargaining power in the purchase of cable, equipment and programming. However, given the fact that Cablevision alleged that CLW's position constituted potential anticompetitive conduct, the courts below were correct in assuming the truth of the factual allegations for purpose of addressing a motion to dismiss the complaint.

Cablevision states that it "does not contend that the decision of the City and CLW to enter the cable television business violates the antitrust laws." (*Id.*)

Notwithstanding this denial, it is clear that Cablevision's goal is to eliminate CLW as a competitor. Indeed, in terms of relief Cablevision's complaint asks that the City and CLW be permanently enjoined from constructing and operating a cable television system. (See the appendix hereto at 13a.) In an attempt to rewrite facts that go far beyond any allegations in its complaint, Cablevision's petition claims that CLW is engaged in "cross-subsidization" of its cable service, "below cost pricing," and having exerted unfair pressures on municipal employees. (Petition at notes 6 and 7.) None of these allegations are mentioned in its complaint. Indeed, they could not have been since the complaint was filed long before CLW actually commenced cable service.

The facility with which Cablevision toys with the facts and shamelessly changes its position without regard for the bases cited in its complaint is little short of outrageous, not to speak of its brazen attempt to use the antitrust laws to shield itself from competition.

Indeed, as both of the courts below concluded, even a cursory reading of the Arkansas statutes reveals a clear legislative intent to allow municipalities to enter the cable television business. To the extent such entry results in competitive harm of the type alleged in the complaint to an existing cable operator, the legislature obviously contemplated it as a necessary and reasonable consequence, as the Eighth Circuit concluded. Cablevision's hyperbole

notwithstanding, the only issue raised by its complaint is entry and entry alone.

Hence, there is no rational basis for the claim that the "reasonably foreseeable consequence" test for immunity as set forth in *City of Lafayette* has not been satisfied.

III. No Legitimate First Amendment Claim Has Been Raised

Cablevision's complaint alleged that a provision of its franchise agreement violated the First and Fourteenth Amendments. The objected to provision (in Section 2.4) states in relevant part:

> This agreement does not cover . . . additional income-producing activities of [Cablevision] such as advertising over [Cablevision's] cable TV system. If [Cablevision] should decide to offer services to subscribers involving these or other major technical advances or to undertake other income producing activities, it will first notify the City and offer its proposed modification to this Agreement to cover such additional services and activities, and the proposed modification shall be subject to negotiation.

Below, Cablevision argued that this provision impinges upon its commercial free speech rights and is discriminatory since the CLW franchise agreement contains no such restriction. Further, Cablevision argued that the City will permit such advertising only if the resulting revenue is subjected to the franchise fee paid to the City.

The District Court found that this provision does not constitute the regulation of commercial speech, but offers

"the parties a mechanism by which they may, at their election, submit proposals for the modification of existing contractual terms should unusual circumstances so require."[13]

The court of appeals affirmed the dismissal of these constitutional claims but on a somewhat modified ground. It held that while this provision does "inhibit Cablevision's ability to air commercials, and thus limits speech in the purest sense . . . By entering into the franchise agreement, however, Cablevision effectively bargained away some of its free speech rights."[14] As to the discriminatory media tax claim, the Eighth Circuit agreed with the District Court that it was premature.[15]

According to Cablevision, the thrust of this decision is that "a local government, in exchange for a franchise, is free to extract the entirety of the First Amendment rights recognized by the Supreme Court." (Petition at 21.) Again Cablevision's rhetoric outruns the alleged facts. Nowhere in its complaint does Cablevision allege that it was forced into such a concession in order to gain the franchise or was otherwise subjected to undue pressure by the City. Indeed, any reasonable reading of the provision would indicate simply that it was a matter not covered by

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[13] Opinion as reprinted in Petitioner's brief at 24a.

[14] Decision reprinted at 8a in the Petition.

[15] The Eighth Circuit opinion is in error when it states that CLW's advertising revenues are not "burdened" by application of a franchise fee. While CLW's franchise does not proscribe it from carrying local advertising, all of its revenues are subject to the franchise fee – the precise arrangement that the City has offered Cablevision.

the agreement and subject to future negotiation if Cablevision decided it wanted to engage in such activities. In fact, Cablevision's complaint acknowledges that the City has indicated it would amend the agreement to allow Cablevision to carry provided that the advertising revenues were subject to the franchise fees.[16]

Apart from its rhetorical flourishes, Cablevision challenges this Eighth Circuit finding on the ground that it constitutes a constitutional waiver, to which the court did not apply the proper test, i.e. that it must be "voluntary, knowing and intelligent," citing *Edwards v. Arizona*, 451 U.S. 477, 483-85 (1981); *Faretta v. California*, 422 U.S. 806, 835 (1981); and *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185 (1972); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); and *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and that such waivers be established by clear and compelling evidence, citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967).

Initially, one must challenge Cablevision's argument that the court of appeals' finding amounted to a constitutional waiver. Although one could conclude in the abstract, as did the court of appeals, that the contractual provision at issue may "impinge" upon Cablevision's unfettered right to carry local advertisements, such limitation hardly constitutes a waiver of a constitutional right. As Cablevision itself acknowledges, all it had to do to achieve a modification of its franchise agreement so as

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[16] See complaint at paragraph 37, page 10a of the appendix hereto.

to provide for such carriage was to agree that the revenues so derived would be subject to the franchise fee. Hence, if there is a real constitutional issue, it is whether the imposition of a franchise fee on a cable operator's commercial speech is violative of the First Amendment. However, that issue is not raised in the complaint.

But even if the Eighth Circuit opinion could be interpreted to constitute a determination that this contractual provision amounted to a constitutional waiver, any objections by Cablevision at this date are not timely. It is well established that "constitutional objections may be waived by a failure to raise them at a proper time." *Curtis Publishing Co. v. Butts*, 388 U.S. at 143, citing *Michel v. Louisiana*, 350 U.S. 91, 99 (1955). If at the time that Cablevision entered into this contract it felt that the provision in question unduly "impinged" on its constitutional right, it had an obligation to raise an objection at that time. It did not do so. To the extent that this contractual provision constituted a surrendered constitutional right, it was clearly a bargain that was acceptable to Cablevision at the time. As the Eighth Circuit concluded:

> Cablevision could have bargained for an unqualified right to solicit and transmit advertisements. No law mandated otherwise. Cablevision simply failed to protect its commercial rights. Presumably Cablevision received consideration in return for this sacrifice, but apparently what was once considered a satisfactory bargain has turned into a sour deal. Regardless, Cablevision cannot now invoke the first amendment to recapture surrendered rights.[17]

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[17] Opinion reprinted in Petition at 8a.

Cablevision cannot now reasonably raise the First Amendment issue or claim that the Eighth Circuit did not apply the formal test for waiver. Obviously, Cablevision knowingly waived its unfettered rights to carry the advertising in question at the time it executed the agreement. It cannot now be heard to claim at this late date that any such constitutional waiver was not done voluntarily and knowingly, particularly when its complaint never made any allegations that suggested otherwise or alleged that it was coerced.[18]

Finally, as this Court has recognized, the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 563 (1980). Except for *D.H. Overmyer Co. v. Frick Co.* and *Curtis Publishing Co. v. Butts* all the cases cited by Cablevision in support of a relatively rigorous standard for applying the test for constitutional waiver involve criminal cases where personal liberty is at stake and this Court has traditionally applied a more exacting standard. Similarly, the Court has applied an exacting standard relative to libel suits against the press, which was the focus of *Curtis Publishing Co.* In *D.H. Overmyer Co.* the

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[18] Cablevision attempts to suggest the possibility of coercion, without alleging that it was actually subjected to coercion by the City, by referring to hypothetical possibilities and quoting language from *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989), involving circumstances in which a local government regulatory body "stipulated" that the cable operator waive certain constitutional rights. (See Petition at 23.) There are no factual parallels here, alleged or otherwise.

Court suggested a less rigorous standard in a corporate-property right context where there is no evidence of "unequal bargaining power or overreaching." 405 U.S. at 185-86. Given the confluence of the lesser protection afforded commercial speech with the less rigorous application of the constitutional waiver standards, there is no reason to believe that the constitutional analysis of the Eighth Circuit would not suffice under circumstances here.

Accordingly, there is no doubt that the court of appeals properly decided the constitutional issue.

CONCLUSION

As demonstrated above, there is no reason why this Court should grant Cablevision's petition. Cablevision has greatly overstated the legal issues that are relevant to the case. In view of the issues here, both factual and legal, there is no need for the Court to address the issues posited by Cablevision. Further, the courts below have resolved the questions at legitimate issue consistent with applicable law and precedent. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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October 17, 1991

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
AT JONESBORO

PARAGOULD CABLEVISION, INC. Plaintiff, v. CITY OF PARAGOULD, ARKANSAS, PARAGOULD LIGHT AND WATER COMMISSION, CHARLES PARTLOW, DON PERKEY, DOUGLAS J. SMITH, TIM WOOLDRIDGE, BEN BRANCH, PHYLLIS DEES, JAY W. DORTCH, FRANK GATLIN, JAMES INNESS, GEORGE COOK, JEPTHA FUTRELL, JERRY JETTON, WILLIAM BREWER, MACK SHOTTS Defendants.	)	Civil Action No. J-C-90-14 (Filed Jan. 29, 1990)

COMPLAINT

Plaintiff Paragould Cablevision, Inc. brings this action seeking injunctive and other relief for violations of the federal antitrust laws and the United States Constitution and for breach of contract against Defendants City of Paragould, the Paragould Light and Water Commission, and the individual members of the Paragould City Council and the Paragould Light and Water Commission.

JURISDICTION AND VENUE

1. This action arises out of violations of the Sherman Act, 15 U.S.C. § 2, and the First and Fourteenth Amendments to the United States Constitution and out of a breach of contract by Defendants.

2. This court has jurisdiction over these claims and the Defendants under Section 16 of the Clayton Act of 1914, 15 U.S.C. § 26, Section 1983 of Title 427 of the United States Code, 42 U.S.C. § 1983, and Section 1331 of Title 28 of the United States Code, 28 U.S.C. § 1331, and under principles of pendent [sic] jurisdiction. Venue is proper in this district under Section 1391(b) of Title 28 of the United States Code, 28 U.S.C. § 1391(b).

PARTIES

3. Plaintiff Paragould Cablevision, Inc. ("Paragould Cablevision") is a Massachusetts corporation with its headquarters and principal place of business in Greene County, Arkansas. Paragould Cablevision operates a cable television system in Paragould, Arkansas pursuant to a franchise granted to it by the City of Paragould.

4. Defendant City of Paragould, Arkansas ("City") is a municipal corporation organized and existing under the laws of the State of Arkansas and located in Greene County, Arkansas.

5. Defendant Paragould Light and Water Commission ("CLW") is an entity created by the City of Paragould pursuant to Act 562 of 1953. By Ordinance Nos. 625

and 84-7, the City of Paragould has charged CLW with the responsibility of operating, controlling, and supervising its municipally-owned light, water and sewer plants.

6. Defendant Charles Partlow is sued solely in his official capacity. He is and at all times relevant was the Mayor of the City of Paragould, Arkansas.

7. Defendant Don Perkey is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of Paragould, Arkansas.

8. Defendant Douglas J. Smith is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of Paragould, Arkansas.

9. Defendant Tim Wooldridge is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of the City of Paragould.

10. Defendant Ben Branch is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of Paragould, Arkansas.

11. Defendant Phyllis Dees is sued solely in her official capacity. She is and at all times relevant was a member of the City Council of Paragould, Arkansas.

12. Defendant Jay W. Dortch is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of the City of Paragould.

13. Defendant Frank Gatlin is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of the City of Paragould.

14. Defendant James Inness is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of the City of Paragould.

15. Defendant George Cook is sued solely in his official capacity. He is and at all times relevant was a member of the Paragould Light and Water Commission.

16. Defendant Jeptha Futrell is sued solely in his official capacity. He is and at all times relevant was a member of the Paragould Light and Water Commission.

17. Defendant Jerry Jetton is sued solely in his official capacity. He is and at all times relevant was a member of the Paragould Light and Water Commission.

18. Defendant William Brewer is sued solely in his official capacity. He is and at all times relevant was a member of the Paragould Light and Water Commission.

19. Defendant Mack Shotts is sued solely in his official capacity. He is and at all times relevant was a member of the Paragould Light and Water Commission.

FACTUAL ALLEGATIONS

20. At all relevant times, Plaintiff Paragould Cablevision has owned and operated a cable system in the City of Paragould. Paragould Cablevision operates its

system pursuant to a November 28, 1983 franchise granted by the City of Paragould, Resolution No. 83-22. A copy of the franchise agreement is attached hereto as Exhibit 1 and is made a part hereof.

21. The cable system owned and operated by Paragould Cablevision consists of a central receiving antenna known as a "headend," and a network of coaxial cable. The coaxial cable is installed in public rights-of-way, generally as an additional wire on utility poles or buried underground in public utility easements. The cable system receives programming at the headend from either broadcast, microwave, satellite, or studio facility transmissions. The programming is then retransmitted by Paragould Cablevision from the headend to subscriber homes. In order to receive cable television, subscribers must have access to a television set that is connected to the cable system's headend through the coaxial cable network.

22. Paragould Cablevision has expanded considerable sums of money in the construction and maintenance of its cable system over two decades and currently has over 6,000 subscribers. From 1986 to 1989 alone, Paragould Cablevision spent in excess of $ 1.2 million to upgrade cable service to the City of Paragould.

23. On June 17, 1986, the City of Paragould adopted Ordinance 86-3, authorizing CLW to construct and operate a duplicative, municipally-owned cable television system. The Ordinance authorized CLW to pursue its plan to construct and operate a cable system that would provide

a forty channel basic service at a cost of $9.95 per subscriber.

24. On June 6, 1988, the City adopted Resolution 88-10 directing CLW to undertake the necessary steps for construction and operation of a cable television system. Subsequently, on January 16, 1989, pursuant to Resolution No. 89-1, the City of Paragould approved a cable television franchise agreement between the City of Paragould and CLW authorizing CLW to construct and operate a cable television system within the City of Paragould in competition with Paragould Cablevision. A copy of the franchise agreement between the City and CLW is attached hereto as Exhibit 2 and is made a part hereof.

25. The construction of the cable television system by CLW is contingent upon the City of Paragould obtaining funds through the issuance of bonds. At an election held on October 31, 1989, a majority of the voters in the City of Paragould authorized the issuance of such bonds in an amount not to exceed $3.22 million for the purpose of financing the cost of acquiring, constructing and equipping a cable television system. The bonds are to be secured by a pledge of the revenues derived from operation of the cable television system and by a suspended tax at the rate of 6.5 mills on the dollar, on the assessed value of the taxable real and personal property in the City of Paragould. On information and belief, the issuance of these bonds could therefore result in the imposition of a real and person property tax rate that is up to three times greater that the rate currently imposed on the citizens of Paragould. The issuance of these bonds is believed to be imminent.

COUNT I
(Attempt to Monopolize)

26. Plaintiff realleges and incorporates the allegation of paragraphs 1 through 25.

27. This claim arises under Section 2 of the Sherman Act, 15 U.S.C. § 2. Plaintiff's conduct and operation of cable television facilities, including the receiving of microwave and other signals over state lines and the marketing of programs is in interstate commerce and has and will have an impact on interstate commerce. The relevant market consists of the construction and operation of cable television distribution facilities and the provision of cable television services in and about the City of Paragould, Arkansas.

28. Defendant CLW holds a government-created monopoly for the sale of electric service to the City of Paragould. As a part of this monopoly power, Defendant CLW owns the poles necessary for the operation of Paragould Cablevision's cable system. The May 11, 1965 Pole Attachment Agreement between Paragould Cablevision and CLW gives Defendant CLW the discretion to deny any requests of Paragould Cablevision for attachment of its cable and the discretion to terminate the agreement with six months notice. Further, the agreement gives CLW the right to revoke the contract if use of the poles by Paragould Cablevision is forbidden by law or objectionable to any public authority.

29. On information and belief, if a second cable television system were to be constructed by CLW, approximately 80 percent of the poles owned by CLW would

require relocation of cable facilities in order for the second cable television system wire to be strung. On information and belief, the cost of this restringing has not been factored into the financial estimate done by the City for construction of the duplicative cable system. On information and belief, the City is using its leveraging power to impose all or part of the cost of the pole relocations onto Paragould Cablevision.

30. On information and belief, Defendant CLW plans to string its cable along electric lines in violation of the National Electric Safety Code ("NESC") spacing requirements in many instances. These spacing requirements protect both the lives of workers and the general public from potentially dangerous construction and the wires and equipment of others that are installed on the poles. Stringing cable in this manner would place an unfair burden on Paragould Cablevision as a competitor because it jeopardizes the safety of Paragould Cablevision's personnel who repair and readjust its plant on CLW's poles. Such restringing would also endanger the plant itself and impair Paragould Cablevision's ability to compete by subjecting the company to more burdensome and costly standards than those imposed on Defendants' duplicative cable system. Upon information and belief, Defendants intend that Paragould Cablevision will be responsible for absorbing the costs associated with its facilities to enable CLW's cable to be installed in a manner necessary for compliance with relevant code.

31. CLW's power to control the use of the poles, its monopoly power held in the provision of electric service, its new status as a direct competitor with Paragould

Cablevision, and its announced intent to proceed with the construction and operation of a cable television system results in a dangerous probability of success in excluding competition from, and monopolizing, the relevant market.

32. Defendant City granted the November, 1983 franchise under which Paragould Cablevision operates and, as such, is a party to the contract that provides Paragould Cablevision with the right to provide cable television service to Paragould residents for profit. The City possesses the power to regulate Paragould Cablevision's operations, to impose obligations on Paragould Cablevision's business, and to require a franchise fee from Paragould Cablevision. As a direct competitor with Paragould Cablevision, CLW and the City enjoy a dangerous probability of success in excluding competition from, and monopolizing, the relevant market.

33. The conduct of the City and CLW threatens to restrain trade and destroy competition in the relevant market, and constitutes an attempt to monopolize because no other cable television company, including Paragould Cablevision, has or will have the financial ability to provide cable television service to customers in direct competition with a municipality, a government-subsidized utility company and the owner of the poles necessary for provision of cable service. Plaintiff has no adequate remedy at law and is suffering and will, by reason of the conduct of the Defendants, continue to suffer injuries to business, property and future business that cannot be adequately measured or compensated at

law. Plaintiff is entitled to equitable relief and to attorneys' fees and costs.

COUNT II
(Violation of the First and Fourteenth Amendments to the United States Constitution)

34. Plaintiff realleges and incorporates the allegations of paragraphs 1 through 33.

35. Paragraph 2.4 of the franchise agreement between Paragould Cablevision and the City specifies and, on information and belief, has been interpreted by the City to require, that Paragould Cablevision must notify the City, offer its proposed modification to its franchise agreement, and engage in negotiations prior to offering to sell time to advertisers or engaging in other income-producing activities over its cable system.

36. The City has consistently argued that Paragraph 2.4 is a valid and enforceable provision of its franchise agreement with Paragould Cablevision and has insisted that Paragould Cablevision is not permitted to insert advertising on the services transmitted by its cable system without modification of its agreement with the City.

37. The City has indicated that while it may be willing to acquiesce to Paragould Cablevision's request to insert local advertisements, it will do so only if the revenues from such advertisements are included in the franchise feed paid by Paragould Cablevision to the City under Paragraph 5.10 of the franchise agreement between the City and Paragould Cablevision.

38. The January, 1989 franchise agreement between the City and CLW does not contain any similar provision restricting the municipally-owned system's right to engage in income-producing activities such as advertising or requiring notification of CLW's engagement in such activities. On information and belief, the City has not imposed such a restriction on CLW.

39. The City's restriction on Paragould Cablevision's right to sell and transmit advertising on its cable system and its decision not to impose the same restriction on CLW impermissibly favors the rights of certain speakers over others in violation of the First and Fourteenth Amendments of the United States Constitution.

40. The City's imposition of the restriction on advertising on Paragould Cablevision, its failure to impose such a restriction on CLW and its efforts to tie a decision to grant permission to advertise to the amount of franchise fees paid solely by Paragould Cablevision constitutes a discriminatory media tax in violation of the First and Fourteenth Amendments of the United States Constitution. The City's franchise agreement with CLW limits the calculation of the municipally-owned system's franchise fee to revenues generated by basic and pay cable services.

COUNT III
(Breach of Contract)

41. Plaintiff realleges and incorporates the allegations of paragraphs 1 through 40.

42. Paragould Cablevision's franchise with the City, Resolution No. 83-22, is a contract between Paragould Cablevision and the City. Implied in that contract is a duty of good faith and fair dealing and the reasonable expectation that the parties will not do anything to impair the obligations and rights provided in the contract, the parties' performance of the contract, or the parties' enjoyment of the benefits of the contract.

43. The City's conduct in granting a cable television franchise to CLW and in failing to negotiate in good faith with Paragould Cablevision constitutes a willful breach of its contract with Paragould Cablevision by impairing Paragould Cablevision's ability to perform the contract, by obstructing the contract's purposes and performance, by denying Paragould Cablevision the benefits of the contract, and by contravening the City's implied representations to Paragould Cablevision regarding the City's intention to directly or indirectly compete with Paragould Cablevision.

44. By granting CLW a franchise agreement that contains no prohibition of local advertising and by affording CLW a discriminatorily favorable franchise fee, and upon information and belief, and by other acts currently unknown to Plaintiff, City has breached its duty of good faith and fair dealing inherently contained in its franchise agreement with Plaintiff.

NOW WHEREFORE, Plaintiff demands judgment:

1. That Defendants have violated Section 2 of the Sherman Act;

2. That Defendants have violated the First Amendment rights of Plaintiff;

3. That Defendant City has violated its contract with Plaintiff;

4. That Plaintiff is awarded the costs of this action and attorneys' fees;

5. That Defendants are permanently enjoined from constructing and operating a cable television system; from stringing cable wires in violation of NESC rules; and ordered to comply with such other injunctive relief necessary to maintain competition in the relevant market; and

6. That Defendant City has violated Plaintiff's rights under the First and Fourteenth Amendments of the United States Constitution and is permanently enjoined from enforcing Paragraph 2.4 of its franchise agreement with Paragould Cablevision.

7. That such other relief be granted that the Court shall deem appropriate.

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